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**From:** Nicholas Whipps <nwhipps@biologicaldiversity.org>  
**Sent:** Tuesday, October 06, 2015 5:11 PM  
**To:** FOIA HQ  
**Cc:** Miyoko Sakashita  
**Subject:** FOIA Request: Vehicle Emissions Standards Exceedance Data  
**Attachments:** FOIA\_EPA Vehicle Emissions Exceedance Data.pdf

Hello,

Please review the attached FOIA request from the Center for Biological Diversity. We look forward to your response.

Sincerely,

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*Sent Via E-mail and First-Class Mail*

October 6, 2015

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460  
Phone: (202) 566-1667  
E-mail: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

**Re: FOIA Request—Full Clean Air Act Vehicle Emissions Exceedance Data for All Air Pollutants**

To Whom It May Concern:

This request is made under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), on behalf of the Center for Biological Diversity (“Center”). The Center respectfully requests a full accounting of the actual amount of pollution released because of Volkswagen’s installation of defeat devices in its vehicles from the U.S. Environmental Protection Agency (“EPA”). Specifically, we seek:

- 1) **From 2009 to the present: A full accounting of all pollution emissions from Volkswagen vehicles with defeat devices, including the total amount of the greenhouse gas nitrous oxide (N<sub>2</sub>O);**
- 2) **From 2009 to the present: All documents and communications containing information on other vehicle brands that emit nitrogen oxides (NO<sub>x</sub>) in excess of Clean Air Act limits, and a full accounting of all pollution emissions (including N<sub>2</sub>O) for those brands, including but not limited to BMW, Ford, Mazda, and Mercedes—cars that researchers found to emit levels of NO<sub>x</sub> up to seven times the legal limit.**

The documents sought by the present request include any written, recorded, or graphic material that is in the agency’s possession, custody, or control, including forms, maps, memoranda, reports, surveys, models, studies, letters, telegrams, facsimiles, electronic correspondence (including e-mail in any form), “Power Point” presentations, and notes, minutes, and transcripts of conferences, meetings, and telephone or other communications.



## **REQUEST FOR FEE WAIVER**

The Center requests that you waive all fees in connection with this request. FOIA states that information should be furnished free of charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

In considering whether the Center meets the fee-waiver test, it is imperative that the EPA remember that FOIA carries a presumption of disclosure, and that the FOIA fee-waiver amendments of 1986 were designed specifically to facilitate access to government records for non-profit, public interest groups such as the Center without the payment of fees. As stated by one Senator, “agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy); see also McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Senator Leahy). This waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests, in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups.” Better Gov’t Ass’n v. Dep’t of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986). Congress and the courts have consistently maintained that the main legislative purpose for the fee waiver is to facilitate access to agency records by “watchdog” organizations, such as environmental groups like the Center, which use FOIA to monitor and challenge government activities.

As shown below, the Center meets the two-pronged test under FOIA for a fee waiver, as implemented by the EPA’s fee waiver regulations at 40 C.F.R. § 2.107. In evaluating our fee request, it is important to recognize that U.S. Government agencies consistently grant our requests for the waiving of FOIA fees.<sup>1</sup> These agencies, among others, have recognized that (1) our requested information contributes significantly to the public understanding of the operations or activities of the government, (2) our requested information enhances the public’s understanding to a greater degree than currently exists, (3) the Center possesses the expertise to analyze, to present and to explain the requested information to the public, (4) the Center possesses the ability to disseminate the requested information to a broad audience of the general public, (5) and that the news media recognizes that the Center is an established expert in the field of greenhouse gas emissions as they relate to climate change.

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<sup>1</sup> These agencies include the Air Force, Animal Damage Control, Army, Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Department of Agriculture, Department of Commerce, Department of Defense, Department of the Interior, Department of Justice, Department of Transportation, Federal Bureau of Investigation, Federal Aviation Administration, Fish and Wildlife Service, Forest Service, General Accounting Office, National Aeronautical and Space Administration, National Science Foundation, Office of Management and Budget, Rural Economic Community Development Agency, and the Smithsonian Institution, among others.

**I. Disclosure of this information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government**

Each of the elements of this prong of the fee waiver test is discussed below.

**A. The subject of the request concerns the operations and activities of the government**

The subject matter of this request relates to the EPA's administration of the CAA as it relates to vehicle emissions regulations and testing. Furthermore, it is clear that such activities, as well as EPA's overall oversight of the CAA, are specific and identifiable activities of an executive branch agency of the Federal government. See Judicial Watch, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted). Thus this FOIA request plainly concerns the operations or activities of the government. 40 C.F.R. § 2.107(l)(2)(i).

**B. The disclosure is likely to contribute to public understanding of government operations or activities (the informative value of the information to be disclosed).**

There is no question that the documents requested will contribute to an understanding of federal government operations. 40 C.F.R. § 2.107(l)(2)(ii). The requested information concerns vehicle emissions data held uniquely by the EPA and not yet in the public domain. Public oversight and enhanced understanding of this agency's compliance with its mandate to protect human health and the environment from excessive harmful vehicle emissions is necessary. The public is always well served when it knows how government activities have been conducted. See Judicial Watch, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not”).

In McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations.” Regarding vehicle emissions data from the above manufacturers, all the requested documents potentially provide new information about vehicle emissions in the U.S., as well as the EPA's testing of these emissions. As recent news coverage of emissions testing and VW's use of a “defeat device” suggests, most data regarding diesel-fuelled vehicle emissions testing is not widely available.<sup>2</sup> See Western Watersheds Project v. Brown, 318 F.Supp.2d 1036,

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<sup>2</sup> See, e.g., Russell Hotten, *Volkswagen: The Scandal Explained* (Sept. 25, 2015), <http://www.bbc.com/news/business-34324772>.



1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also Community Legal Services v. HUD, 405 F.Supp.2d 553 (D. Pa. 2005) (FOIA request “would likely shed light on information that is new to the interested public.”)

Thus, the requested information will allow the Center and the general public to better understand the operations and activities of the federal government. 40 C.F.R. § 2.107(l)(2)(ii)

**C. Disclosure of the requested information will significantly contribute to “public understanding.”**

The release of vehicle emissions data and other information will provide the public with an enhanced understanding of vehicle emissions and the EPA’s role in the enforcement of the relevant sections of the CAA. 40 C.F.R. § 2.107(l)(2)(iii)-(iv). The Center members’ track record of active participation in oversight of governmental agency activities and its consistent contribution to the public’s understanding of agency activities are well established. The information received from this FOIA request will be used to contribute to one or more of the following: production of or defense of administrative petitions, court documents, public interest litigation, local and national newsletters, public presentations, local and national news stories contributed to or written by the Center and its members.

The Center does not possess the information requested in any form. Nor do we know of any other source for obtaining this information. This information will be shared with other environmental organizations and with a broad audience of the general public.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency’s] regulation, or our case law require[s] such pointless specificity.” Judicial Watch, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. Id.

The Center has a recognized ability to disseminate this information broadly. The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. Center staff includes scientists, lawyers, public organizers, and media experts. The Center has been involved in the oversight of numerous government agencies for years and has consistently displayed its ability to disseminate information granted to it through FOIA.

The Center has over 900,000 members and supporters that live throughout the United States. The Center maintains an active listserv and electronic newsletter that provide information about climate-related issues on a weekly basis. The Center also publishes a quarterly newsletter to inform our members and other citizens on issues affecting human health and the environment.



For example, information such as that presently requested is often disseminated through our e-mail alerts to 300,000 people approximately once a week, and our web page, which is accessed several hundred-thousand times each month. The requested information will likely be disseminated through all of these means. See Forest Guardians v. Dep't of Interior, 416 F.3d 1173, 1180 (10th Cir. 2005) ("Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.").

The Center's informational publications supply information not only to our membership, but also to the memberships of other conservation organizations, locally as well as nationally and internationally. The Center is actively involved in climate-change and emissions-related human health issues throughout the continental United States, Alaska, and Hawaii, as well as outside of the United States. The Center will share the information received from this FOIA request with other organizations interested in issues affecting climate change and human health. Courts have recognized that similar information distribution activities are likely to contribute to public understanding of government operations and activities. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005)

Our informational publications contribute information to public media outlets, as well. Concurrent with any action which the Center may take after obtaining the requested documents, the Center will publicize these consequences. This is certain to result in a significant increase in public understanding of government agency activity, and in particular of federal agency responsibilities under the CAA. The Center has publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one. The Center intends to use the documents requested in this request in a similar manner.

**D. The public's understanding of government operations or activities will be enhanced to a significant extent**

As also discussed above, at this time, the public does not have the ability to fully evaluate the actions (or inaction) of the EPA with regards to the results from EPA's vehicle emissions testing. That will remain impossible until such data is made available through this request. Once available, such data can be analyzed and presented to the public in a manner that will significantly enhance the public's understanding of this issue.

**II. Obtaining the information is of no commercial interest to the Center**

Access to government documents and similar materials through FOIA requests is essential to the Center's role of educating the general public. The Center, a non-profit

organization, has no commercial interest and will realize no commercial benefit from the release of the requested information. 40 C.F.R. § 2.107(l)(3)(ii)

### CONCLUSION

We hope that this letter has demonstrated to your satisfaction that the Center qualifies for a full fee waiver. But should you decide not to waive fees, we request that you contact us prior to incurring any costs in excess of \$25.

FOIA provides that if portions of a document are exempt from release, the remainder of the document must be segregated and disclosed. 5 U.S.C. § 552(b). Please send to us all non-exempt portions of the documents that we have requested, and we ask that you justify any deletions by reference to specific exemptions allowed under FOIA.

If you elect to withhold any documents responsive to this request under Exemption 5 of FOIA, please explain:

- 1) Why each document withheld is predecisional
  - a. To what decision is each of the documents leading?
  - b. Has this decision been finalized?
- 2) Why each document withheld is deliberative and to what extent does each make a recommendation on a legal or policy matter
- 3) Any policy recommendations that qualify each document for exemption.

We reserve the right to appeal your decision to withhold any materials and will likely do so.

We look forward to your reply within 20 working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If some of the documents requested will take longer than 20 days to compile and distribute to us, please do not let that delay our receipt of the remainder of the documents. Please send all materials to my attention at the address below. The Center is willing to receive responsive records in electronic format where possible.

Please call or e-mail using the contact information, below, if you have any questions about this request. We may be willing to modify our request to get a quicker response, so I encourage you to contact me with any concerns. Thank you.

Sincerely,

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